

DEPARTMENT OF HEALTH & HUMAN SERVICES

SG Book
Office of the Secretary
Office of the General Counsel

Public Health Division
Room 4A-53 Parklawn Bldg.
5600 Fishers Lane
Rockville, Maryland 20857
(301) 443-2644

June 28, 1995

TO : Michael H. Trujillo, M.D., M.P.H.
Director, Indian Health Service

FROM : Barbara Hudson, Attorney
Office of the General Counsel

SUBJECT : Request for Opinion 95-28: Review of Unsigned
Self-Governance Compacts and Annual Funding
Agreements

In your memorandum of June 26, you indicated that the agency was considering a process in which the negotiated agreements under Title III of the Indian Self Determination Act would be distributed for the review of section 303(a)(9) without the Director's signature. You asked our advice on whether such a procedure would be legally supportable. We do not believe sending out unsigned annual funding agreements (AFA) would be consistent with the provisions of Title III. However, we do believe that the agency and tribes may agree to extensions of existing AFAs to permit resolution of issues in controversy.

Section 303(a) directs the Secretary to negotiate and enter into "an annual written funding agreement" with the governing body of a tribe. Section 303(a)(9) states that the annual written funding agreement shall be submitted 90 days prior to the effective date to the Congress for review. Agreement is defined as --

A coming or knitting together of minds.

The union of two or more minds in a thing done or to be done.

A mutual assent to do a thing.

The writing or instrument which is evidence of an agreement.

(Blacks Law Dictionary, 4th ed., 1969.) Essentially, an agreement is a meeting of the minds or the mutual manifestation of assent to the same terms. The law requires the Secretary to "enter into an annual written funding agreement. Each party evidences his or her assent to the terms by signing the document. An unsigned written document would contain no evidence that it represented an agreement between the parties.

With respect to your second question, I do not find anything in law which would prohibit the parties from agreeing to extend the existing AFA to allow the time necessary to have a "meeting of the minds", a prerequisite to entering a new AFA. In fact, many of the AFAs/Compacts contemplate such extensions. The AFAs/Compacts should be reviewed to assure compliance with any extension provisions. If the AFA/Compact is silent, the parties would agree upon the length of the extension. Of course, if the extension approaches one year, the parties essentially have agreed upon a new annual funding agreement.

Further, nothing would prohibit the parties from including language in the extension to cover a particular situation. In other words, if funding were at issue, the parties could agree to extend the existing AFA at a funding level not in dispute. Hopefully, during the extension, the parties will reach a "meeting of the minds". Subsequently, the agreement is written, signed, and sent out for review 90 days prior to its effective date.

I hope this information is helpful to you. If you have questions, please give me a call at 301-443-0406.



Barbara Hudson
Attorney

cc: Richard McCloskey
Division of Legislation and Regulations

Reuben Howard
Office of Tribal Self Governance

Indian Health Service
Rockville MD 20857

RFO: 95-28

JUN 26 1995

TO: Duke McCloud
Senior Attorney

FROM: Director

SUBJECT: Request for Opinion 95-28: Review of Unsigned Self-Governance Compacts and Annual Funding Agreements

Section 303(a)(9), Title III, Indian Self-Governance Demonstration Projects, Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638, as amended, requires that 90 days before the proposed effective date the Annual Funding Agreements (AFA) must be submitted to each tribe affected by the AFA and to designated committees of Congress for review. In its first 2 years of the self-governance demonstration, the Indian Health Service (IHS) practice has been to have the AFA signed by the Director before it is distributed for review. This practice has satisfied the tribal desire that there be a "binding agreement" at this point in the process, but has raised both technical and substantive issues that need to be resolved. For example, because actual negotiations with tribes are concentrated in a 6-week period ending less than 2 weeks before the end of June and September, a truncated review process within IHS results. To meet this shortened timeframe, AFAs/Compacts carry notes indicating areas of continued disagreement. Agency staff have experienced difficulties in addressing issues raised during the 303(a)(9) review, and there is a widespread perception among tribes that, once signed, changes in the AFA cannot be made.


The IHS is considering a process in which the negotiated AFA/Compact would be distributed for the 303(a)(9) review without the Director's signature. At the same time, the negotiated AFA would receive internal IHS review. Ideally, the timing for this could be as early as 120 days before the proposed effective date of the AFA in order to allow 30 days to address and negotiate any issues raised in the combined internal/external review, and then sign the final AFA. In practice, however, the timing would depend on the negotiation schedule established by the Office of Tribal Self-Governance.

We believe this would be an improvement over the current procedure by permitting sufficient time to allow for a more responsible review and the time to address any raised issues. Another benefit would be to clarify the current situation where a negotiated, yet incomplete, agreement is viewed as binding.

Your advice on whether the above procedure is legally supportable at this point in the demonstration project, as well as any suggestions to strengthen the procedure, would be much appreciated.

A second and related question concerns the problem that arises when agreement, needed for a subsequent year of operation, cannot be reached on an AFA. There have been instances where a mutually agreed extension of the old AFA has been permitted. This raises a number of legal questions. Is there anything in the law that would prevent this? Can such extensions be for any length of time that is mutually agreeable; e.g., 1 month, 3 months? Can the terms be modified for the period of the extension to cover the issue(s) in controversy; e.g., in a funding dispute, for a sum not in disagreement? How would such procedures fit into the review procedures above; i.e., at what point would a document be distributed per the 303(a)(9) requirement?

Any advice and recommendations you have on these questions would be much appreciated. If you need any assistance or clarification, you may wish to contact Ms. Luana Reyes, Acting Director, Headquarters Operations. Ms. Reyes may be reached on 443-1083.


Michael H. Trujillo, M.D., M.P.H.
Assistant Surgeon General

ROUTING AND TRANSMITTAL SLIP

6-8-95

TO: (Name, office symbol, room number, building, Agency/Post)

Initials Date

1. Black OTA 6A05

apb 6/4

2. Howard OTSG 5A05

3. ~~D/H O Regis~~

6/23

4. Deputy Dir, IHS - Jernigan

5. Director, Pruyler

Action	File	Note and Return
Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See Me
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Please hand carry to next signature point.

I agree with Doug Black's E-mail message.
Note: OTSG's position is that unless there is a signature by both parties, there is no agreement, but in order to get a "legal opinion" we have initialed.

Carol Martin

MEL: To address Doug & Carol's concerns, perhaps neither the State nor DHS should sign. ~~clearances, and similar actions~~

FROM: (Name, org symbol, Agency/Post)

Richard Bruce, Chief
Legal Liaison / Policy Review

Room No. - Bldg.
450 TMP
Phone No.
X1116

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★ U.S. G.P.O.: 1994 300-891/80020

OPTIONAL FORM 41 (Rev. 7-78)
Prescribed by GSA
FPMR (41 CFR) 101-11.208

Barbara to route
this to the
ship for inter
signed AFA
request for opinion 95-28
You may not have see Jernigan's
Comments & Carol Martin's concerns
Richard Bruce

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DOUGLAS P. BLACK@OTA@IHSHQE
Request for Opinion 95-28
Saturday, June 10, 1995 7:37 AM

Subject:
Date:
Attach:
Certify:

N

I have surmised the above Request: "Review of Unsigned Self-Governance
Compacts and Annual Funding Agreements." I do not support the inference
contained in the Request that we may want to distribute the compact and AFA's
without the Director's signature. I believe we need to discuss this issue
extensively before we implement anything like the suggestions contained in the
Request.